

Federal Communications Commission

DA 98-778

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	MM Docket No. 94-76
)	MM Docket No. 94-77
Amendment of Section 73.202(b),)	MM Docket No. <u>95-51</u>
Table of Allotments,)	RM-8470
FM Broadcast Stations.)	RM-8477
(Chester, Shasta Lake City, Alturas,)	RM-8523
McCloud, Weaverville, and Shingletown)	RM-8524
California))	RM-8591

MEMORANDUM OPINION AND ORDER
(Proceedings Terminated)

Adopted: April 15, 1998

Released: April 24, 1998

By the Chief, Policy and Rules Division:

1. The Commission has before it petitions for reconsideration of the *Report and Order* in MM Docket Nos. 94-76 and 94-77, 11 FCC Rcd 5288 (1996) ("*R&O I*"), and of the *Report and Order* in MM Docket No. 95-51, 11 FCC Rcd 8672 (1996) ("*R&O II*"), both filed by m. JAYNE sawyer d/b/a m. JAYNE enterprises ("sawyer").¹ No comments were filed by any party regarding the petitions for reconsideration of *R&O I* or *R&O II*. We will deny sawyer's petitions for reconsideration of *R&O I* and *R&O II*.

BACKGROUND

2. *MM Docket Nos. 94-76 and 94-77.* The Commission issued a *Notice of Proposed Rulemaking* in MM Docket No. 94-76, 9 FCC Rcd 3309 (1994), in response to a petition for rulemaking (RM-8477) filed by sawyer, which proposed the allotment of Channel 296A (107.1 MHz) to Chester, California to provide that community's second local FM service. In MM Docket No. 94-77, another *Notice of Proposed Rulemaking*, 9 FCC Rcd 3318 (1994), was issued in response to a rulemaking petition (RM-8470) filed by Mark C. Allen ("Allen"), who proposed the allotment of Channel 276A (103.1 MHz) to Shasta Lake City, California to provide another transmission service to an area now encompassing this newly created community. Two counterproposals were filed.

3. Goldrush Broadcasting ("Goldrush") filed a consolidated counterproposal (RM-8523) that requested the allotment of Channel 296C3 to Shasta Lake City and the allotment of Channel 297C (107.3 MHz) to Alturas, California, both of which conflict with the sawyer

¹ Public Notice of the filing of both of sawyer's petitions for reconsideration was given on August 30, 1996, Report No. 2150.

proposal in MM Docket No. 94-76 to allot Channel 296A to Chester. Goldrush also proposed the allotment of Channel 276C3 to McCloud, California, which is mutually exclusive with the Allen proposal in MM Docket No. 94-77 to allot Channel 276A to Shasta Lake City. Finally, Goldrush proposed to allot Channel 259A (99.7 MHz) to Chester in lieu of sawyer's proposal in MM Docket No. 94-76 to allot Channel 296A.

4. The second counterproposal (RM-8524) was filed by Corey J. McCaslin ("McCaslin") in Docket No. 94-77. McCaslin proposed that Channel 276C2 be allotted to Weaverville, California as that community's first local commercial FM transmission service. Further, to resolve the conflict with Allen's proposal to allot Channel 276A to Shasta Lake City, McCaslin proposed that Channel 224A (92.7 MHz) be allotted to Shasta Lake City as an alternative equivalent class channel. No opposition was filed to either the first or the second counterproposal.

5. Because of the interrelated nature of MM Docket Nos. 94-76 and 94-77, they were consolidated in *R&O I*. Therein, we adopted, or accommodated with equivalent channels, all requests made in Docket Nos. 94-76 and 94-77. *R&O I* allotted Channel 259A at Chester, California in lieu of originally proposed Channel 296A. *R&O I* also allotted Channel 296C3 to Shasta Lake City in lieu of Allen's proposal to allot Channel 276A to Shasta Lake City and McCaslin's counterproposal to substitute Channel 224A there. Finally, *R&O I* allotted Channel 297C to Alturas, Channel 238C3 (95.5 MHz) to McCloud, and Channel 276C2 to Weaverville.

6. *MM Docket No. 95-51. The Notice of Proposed Rule Making*, 10 FCC Rcd 4909 (1995) ("*Notice II*"), in this docket proposed the allotment of Channel 232A (94.3 MHz) to Shingletown, California in response to another petition (RM-8591) filed by Allen. Two other parties filed comments and counterproposals that were dismissed because they were short-spaced to earlier-filed and cut-off rulemaking proposals in another proceeding. While Allen failed to file comments stating his continuing interest in applying for Channel 232A, he did so in his reply comments. That was not fatal to his request because in his reply comments, he expressed, alternatively, an interest in applying for Channel 241A (96.1 MHz). This channel was allotted in *R&O II* as the second local FM transmission service to the community of Shingletown.

PETITIONS FOR RECONSIDERATION

7. In her petition for reconsideration of *R&O I*, sawyer objects to the allotment of Channel 259A to Chester, in MM Docket No. 94-76, asserting that Channel 296A should have been allotted as she originally proposed and as set forth in the *Notice of Proposed Rulemaking* in that docket. In doing so, sawyer raises two issues. First, she argues that her reconsideration petition is entitled to acceptance and consideration by the Commission even though it raises new matter that was not presented during our consideration of *R&O I*. In support of her argument, sawyer alleges that, although Goldrush's opposition and counterproposal to her rulemaking petition certifies that Goldrush's counterproposal was

mailed to her as required by Commission rules, she did not receive it. As a result, sawyer claims that she had no opportunity to respond to Goldrush's proposal.

8. Second, sawyer argues that the allotment of Channel 296A to Chester was "preferable" to that of Channel 259A, based on her having gathered "empirical data . . . [by] conducting listening tests of FM Frequencies in Chester during her extended visits while on vacations and weekends spent in that community." These listening tests purportedly revealed that FM signals were received in Chester from one full-service FM station and three FM translators, all of which operate in the 98 - 101 MHz band. A new FM station operating on Channel 259, *i.e.* 99.7 MHz, "could possibly cause interference" to the translators. Such interference, claims sawyer, could cause the translators to go off the air given their secondary status, and therefore, it would be neither a "prudent" nor "a wise public relations move" for someone to try to institute a new full-service FM station on that channel.²

9. In her petition for reconsideration of *R&O II*, sawyer recognizes that she did not participate earlier in MM Docket No. 95-51. However, she contends that her reconsideration petition should be considered because the allotment of Channel 241A at Shingletown, made in MM Docket No. 95-51, conflicts with a portion of the alternative allotment plan set forth in her petition for reconsideration of *R&O I*, which was filed 50 days before adoption of *R&O II*. Accordingly, she argues that she is a party adversely affected by the outcome of *R&O II*.

10. Substantively, sawyer requests reconsideration of our decision in *R&O II* to allot Channel 241A to Shingletown. She notes that Allen initially requested a Channel 232A allotment to Shingletown but did not submit comments expressing an interest in applying to operate on Channel 232A, if allotted. Instead, Allen filed reply comments expressing an interest in Channel 241A at Shingletown. She argues that the Commission in *R&O II* should have regarded Allen as having abandoned his interest in Channel 232A because he failed to file a timely expression of interest. Accordingly, sawyer contends that Channel 232A should be allotted to that community or no allotment should be made to Shingletown. Alternatively, sawyer asserts that the expression of interest in Channel 241A made in his reply comments should be regarded as the filing of a counterproposal. Citing Section 1.420(d) of the Commission's Rules, which does not permit the filing of counterproposals in reply comments, sawyer argues that Allen's proposal should not have been considered at all.

² In order to accommodate the allotment of Channel 259A at Chester, sawyer proposed an alternative allotment plan, which could accommodate all parties to these consolidated proceedings. Specifically, she proposed to allot Channel 237C3 (95.3 MHz) to McCloud in lieu of Channel 238C3 and Channel 242C2 to Shasta Lake City in lieu of Channel 296C3. She also proposed to allot Channel 299C (107.7 MHz) or Channel 297C1 in lieu of Channel 297C at Alturas; or, alternatively, she suggested that Channel 297C not be allotted at all because there is already a vacant Class C3 channel allotted to that community. She also had no objection to the allotment of Channel 276C2 at Weaverville.

DISCUSSION

11. Based on a careful review of her arguments and the record, we will deny sawyer's petitions for reconsideration of *R&O I* and *R&O II*. We will address each petition separately.

12. *R&O I*. As a threshold procedural matter, we will entertain sawyer's petition for reconsideration of *R&O I*. While Section 1.47(f) of the Commission's Rules provides that service of a document is complete upon mailing, we will consider her petition, as a discretionary matter, based upon her claim that she did not actually receive Goldrush's counterproposal, the absence of any evidence to the contrary, and an error in sawyer's mailing address on Goldrush's certificate of service.³

13. As to the merits of sawyer's reconsideration petition, she has not provided a sufficient legal or engineering basis for overturning our decision to allot Channel 259A to Chester. In this regard, it is well established that the Commission generally considers channels of the same class to be equivalent for allotment purposes, provided they comply with the Commission's minimum distance separation rules and provide a city grade signal over the entire community of license. See *Randolph and Brandon, Vermont*, 6 FCC Rcd 1760 (1990). Additionally, channels of the same class are considered to be equivalent unless showings are made that a station operating on that channel cannot be constructed for reasons such as aeronautical hazards or environmental effects. See *Vero Beach, Florida*, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989).

14. The petitioner has not met this burden. Her personal "listening tests" on existing channels cannot substitute for controlled engineering field testing and cannot serve as the basis for any finding of interference, much less to or from any channel that is not yet operational. Furthermore, her allegation that interference could possibly be caused to translators is irrelevant because translators are secondary services and are not entitled to protection from full service radio facilities such as FM broadcast stations.⁴

15. Our decision to retain the allotment of Channel 259A at Chester is further buttressed by the fact that the use of this alternative, equivalent class channel enabled us to accommodate all of the parties in MM Dockets 94-76 and 94-77, resulting in new FM

³ Specifically, the community of Chico, California was misspelled as "Cico."

⁴ Moreover, the one full service station and two of the three translators operate on frequencies that are neither co-channel nor first, second, or third adjacent channel to Channel 259A at Chester, and accordingly, are deemed by the Commission never to result in interference to or from operation of that channel.

allotments for five communities. Finally, we note that in spite of sawyer's contention that Channel 259A at Chester is not an equivalent channel, she has filed an application for that channel (BPH-960806MD).⁵

16. *R&O II*. We will also deny sawyer's petition for reconsideration of *R&O II*. While a rulemaking petitioner is expected to submit a continuing expression of interest in the proposed allotment in initial comments to *Notice II*, the Commission has accepted late-filed expressions of interest where there has been no opposition or competing proposal pending. *Santa Isabel, PR*, 2 FCC Rcd 3454, 3455 (Commission 1987), *aff'd sub nom. Amor Family Broadcasting v. FCC*, 918 F. 2d 960, 963 (D.C. Cir. 1991). The rationale for a late acceptance under these circumstances is that no prejudice would occur. In addition, "it is in the public interest to conserve the agency resources that would be necessary to process a second petition for rulemaking filed upon initial dismissal." 918 F. 2d at 963.

17. We believe that *R&O II* properly accepted Allen's alternative expression of interest for Channel 241A, consistent with the above precedent, even though it was submitted in reply comments. While two counterproposals had been filed in response to *Notice II*, proposing the allotment of Channel 232A to Shingletown, they were dismissed on engineering grounds as being in conflict with an earlier-filed and cut-off rulemaking request in another allotment proceeding. *R&O II*, 11 FCC Rcd at 8672, notes 1 and 2. As a result, acceptance of Allen's expression of interest did not "foreclose consideration of any other pending proposal." *Id.* at 8673.

18. As a final matter, it is well established that a party to an allotment rulemaking proceeding may suggest alternative, equivalent class channels for communities that are already part of an allotment proceeding. See, e.g., *Pinewood, SC*, 5 FCC Rcd 7609 (1990). Such proposals are not considered to be counterproposals, and the Commission has the authority to allot alternative channels. *Id.* Allen's alternative suggestion of Channel 241A in lieu of the originally proposed Channel 232A was such a proposal and was, therefore, within the scope of *Notice II*.

18. Accordingly, IT IS ORDERED, That the petition for reconsideration in MM Dockets No. 94-76 and 94-77 filed by m. JAYNE sawyer d/b/a m. JAYNE enterprises is DENIED.

19. IT IS FURTHER ORDERED, That the petition for reconsideration in MM Docket No. 95-51 filed by m. JAYNE sawyer d/b/a m. JAYNE enterprises is DENIED.

⁵ Since sawyer has not provided a basis for changing the allotment of Channel 259A at Chester, there are no grounds for us to consider her alternative allotment scheme. However, we note that there are some deficiencies with this alternative allotment scheme. First, sawyer proposed a higher class allotment at Shasta Lake City for which there was no expression interest. Second, as one several options for Alturas, she suggested a lower class channel for which there was also no expression of interest.

20. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

21. For further information concerning the above, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Charles W. Logan
Chief, Policy and Rules Division
Mass Media Bureau